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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,
v.
ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
ALASKA REEFER and ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
NORTH STAR and NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,
v.
NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUM

I

The Incidence of the Tax on Freezer Ships Is on the Carrying on of Any Part of a Freezer Ship Line of Business Within Alaskan Waters. It Is Not on the "Freezing of Fish." The Thrust of the Tax Is Against a Local Activity Carried on in One or Two Places for the Entire Season, But Not On the Interstate Movement of the Ships Themselves

The respondents profess to be confused regarding petitioner's position as to the incidence of the tax. We wish to make it absolutely clear that we believe that there can be only one incidence of the tax and that incidence of the tax is the incidence named in the first paragraph of Ch. 116, SLA 1951—namely, the prosecution or attempt to prosecute the freezer ship line of business in connection with Alaska commercial fisheries. We believe that the Ninth Circuit Court of Appeals was right the first time it heard the case. At that time the taxable incident was found to be that part of the freezer ship business prosecuted in connection with Alaska commercial fisheries *within the limits of Alaska's taxing jurisdiction.* We believe that the Ninth Circuit in its opinion of March 23, 1959 was correct when it stated that freezer ships were prosecuting a freezer ship line of business in connection with Alaska's commercial fisheries when they sent their boats into Alaska waters to take fish from those waters. Freezer ships carry on a number of different activities during the course of prosecution of a freezer ship line of business within the limits of Alaska's taxing jurisdiction. Among these taxable business activities are the search for fish, the catching of fish, and when the freezer ship is within Alaska waters (and we eventually hope to obtain a juridical determination that Alaska waters include much of

Bristol Bay—see Pet. Br. 12, n. 1), it also includes the unloading of the catcher boats into the mother ship, the freezing of the fish, the moving of the fish back and forth on the ships for better storage, and anything else the freezer ship may do while it is in Alaska's taxing jurisdiction for the purposes of obtaining fish and of freezing the fish immediately thereafter. The state has no desire to leave its taxing jurisdiction to tax any activities of freezer ships occurring outside of Alaska's taxing jurisdiction.

This tax is not a startling departure from the usual concept of a business license tax. Business license taxes are generally on the totality of the business carried on within the taxing jurisdiction. There is no reason to assume that the Alaska freezer ship tax was designed to be anything different.

We believe that courts have erred on two occasions in finding the taxable incident, and they erred because they strayed beyond the language defining the incidence of the tax and wandered into the language describing the measure of the tax. We must confess that when the trial court did this the Territory of Alaska was pleased since under its construction of the statute every fish obtained and processed by freezer ships contributed to Alaska tax revenues. However, now that we have the reasoning of the three-judge panel of the Ninth Circuit Court of Appeals available to us we believe that Court found the law the first time it heard the case. It held that freezer ships outside of Alaskan waters which operate catcher boats within such waters must accept tax responsibility for the fish so obtained. It also held that obtaining fish is an integral part of the operation of the freezer ships and that the catcher boats operated by the freezer ship

itself are but an extension of that ship's operations. We also agree that if freezer ships stay completely outside Alaska's taxing jurisdiction and do not send any of their boats within Alaska waters, there is no way Alaska can reach these ships by its taxes. We believe that when the Court of Appeals went beyond the incidence of the tax in the second opinion and looked to its measure, it erred in much the same way as the trial court. This time we were not pleased by the error, since if the freezer ships are not taxable for their severance operations, are taxable only on their processing operation, and process entirely outside of Alaska's taxing jurisdiction (which may be the situation in part or most of the cases) Alaska's tax revenues would be correspondingly diminished.

Mich.-Wisc. Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954), is evidently respondents' leading case. Respondents state at page 20 of their Brief:

> "In that case a Texas statute levied a tax upon persons engaged in 'gathering gas,' measured by the entire volume of gas 'taken.'"

The Court had good reason for placing the word "taken" in quotes in its opinion and respondents are correct in leaving it in quotes, since the "taken" found in the Texas statute does not connote the usual concepts that "taken" evokes. It also has a different meaning from the word "taken" in the Alaska freezer ship statute. In the *Michigan-Wisconsin* case the word "taken" is synonymous with "received for shipment in interstate commerce." See 347 U.S. at 167. It has no connection with the production of gas. A tax on the "gathering" of gas or on the "taking" of gas, not being a tax on its production, is a tax which is delayed

beyond the step where production and processing has ceased and transmission in interstate commerce has begun. 347 U.S. at 167. The Alaska tax is not delayed beyond the step where production has ceased. The Alaska tax occurs at a time immediately before and immediately after taking occurs. This production is a distinctly local activity capable of forming the basis of the tax imposed. The problem is complicated since the fish "produced" are processed immediately after they are caught so that they will retain their value. However, if that activity occurs outside of Alaska's taxing jurisdiction it could not be of interest to this Court or to us. If it occurs within the three-mile limit or within an inland bay of the State of Alaska, then, of course, it is an activity which the Alaska freezer ship tax is designed to reach, and as we have argued in our earlier Brief, is a distinctly local activity, just as is the taking of the fish.

Freezer ships are not carriers engaged in interstate commerce, waiting to receive gas or grapes for shipment. The facts of this case are not similar to *Crenshaw Bros. & Saffold* v. *Southern Pac. Co.*, 40 Cal. App. 603, 181 Pac. 252 (1919); Resp. Br. 23, n. 25. In that case, claim was made against the railroad company for damage allegedly resulting from imperfect refrigeration of shipments of grapes. The shippers argued that a valuation clause permitted by the Carmack amendment to the Interstate Commerce Act was not applicable to a claim based upon improper refrigeration, where a separate and distinct charge was made for refrigeration. The Court rejected the contention, stating:

> "The charge was distinct, but the refrigeration itself was inseparably connected with the trans-

portation of the fruit, and was an essential part of the transaction." 181 Pac. at 254.

The *Crenshaw* case very well illustrates the difference between a carrier engaged in interstate commerce and a freezer ship operation which is relatively stationary for a prolonged period of time and which is engaged in the extraction of resources within a state. In the *Crenshaw* case the carrier had nothing to do with the production of the grapes which it undertook to deliver in good condition. In the *Crenshaw* case it was not the producer who undertook responsibility for preserving the product until it could be started on its way to another state.

The Ninth Circuit observed in dicta at 277 F.2d 120, 125, R. 387, that if the tax were construed to include such extraterritorial activity as the movement of the freezer ship to and from the fishing grounds in Alaska, the tax would be invalid under the due process clause of the Fifth and Fourteenth Amendments. Yet in hypothesizing applications of the law to various factual situations, it is wise to realize that the thrust of the law is not against movement of ships from Washington to Alaska and back, but is rather aimed at an industry that, as a practical matter, completes all its activities in one area. Plaintiff's Stipulation #1, Exhibit #1 at R. 39 indicates that when freezer ships are in the process of getting fish, their mobility is severely limited. To be of utility they must "maintain a reasonably straight line so that their anchors will not foul." Catcher boats also "must be given room" (R. 39). Homer Kyros, captain of the *Arctic Maid,* stated in his deposition that the freezer ships "anchor off of [sic] the beach in certain designated areas—I say designated—from year to year there are certain anchorages

that we picked out, and *we drop our anchor there for the season*, ..." (R. 262-263). (Italics added.)

This is not the role usually played by companies engaging in interstate transportation. No readjustment in application or change in law is required to apply the law to Alaskan owned and operated ships which might or might not be conducted by a local cannery, more or less as a "field operation." These ships would have Alaskan home ports and would conduct all their business activities within Alaskan waters. Therefore, no aspects of the tax inevitably reach interstate commerce since, if locally owned, the boat may never move or need to move for a profitable operation from its field of operations.

We emphasized in our earlier Brief the dangers inherent in confusing the act of freezing with the subsequent and entirely separate act of transporting the frozen product to another state. See Pet. Br. 13-14. By considering a hypothetical and yet possible application of the law to a purely Alaskan operation, and by showing the ease with which the tax would apply to this Alaskan operation, we hope we have indicated to the Court how divorced the transportation is from the freezing. When transportation is shown to be an incidental aspect of the freezer ship line of business, the clearly *intra*state aspects stand out in their true perspective.

II

Although All Fish Processors in Alaska Pay a Business License Tax, Freezer Ships May Not Complain Because Canneries Are Taxed at a Higher Rate. Freezer Ships Are Not in Competition With Land-Based Cold Storages and May Not Complain About a Different Industry Being Taxed at a Different Rate

Chapter 66, SLA 1949, which imposed a license tax of $5.00 on resident fishermen as compared to a tax of $50.00 on non-resident fishermen and which was later found to be unconstitutional [*Mullaney* v. *Anderson*, 342 U.S. 415 (1952)] is irrelevant to this case. Although the text of the tax act does not explain any underlying purpose it does not appear to be a revenue tax, but rather a regulatory license fee.[1] Moreover, the tax is on individual fishermen and is not on the severance of fish. If it is true that the tax is a regulatory tax, some discrimination between residents and non-residents would be justified because of the greater expense of keeping track of non-resident fishermen (but not a ten-to-one discrimination). See *Toomer* v. *Witsell*, 334, U.S. 385 (1948). Even if Ch. 66, SLA 1949 is a revenue-raising tax rather than a regulatory tax, it is difficult to see why the existence of that revenue tax would have any relevance to a business license tax levying taxes on businesses according to the value of fish obtained for processing. They are greatly different taxes and are administered in different fashions.

[1] Section 5 of the Act requires each buyer of fish to keep a record of each purchase showing the name of the boat from which the catch involved is taken, the amount purchased and the names of all persons on the boat who participated in the trip on which the fish or shellfish were taken, and makes it unlawful for anyone to buy fish from an unlicensed fisherman. This suggests registration for purposes of keeping track of the intensity of the fishing effort.

Respondents state the purpose of the freezer ship tax is to discourage shipment and out-of-state processing of raw salmon (Resp. Br. 28), and cite a statement elicited from one of the tax collectors of the Department of Taxation as authority for the statement (Resp. Br. 28, R. 259-260). An isolated statement of an isolated territorial tax collector should have very little evidentiary value in determining the legislative intent in enacting the freezer ship tax. The legislative intent should be found by considering all of the Alaska fish processing taxes as a whole together possibly with any of the legislative history that may be available. Unfortunately no legislative history is available.

All fish processors engaged in business in connection with Alaska fisheries pay a tax as a result of their engaging in business. See Pet. Br. 6. Because the amount of fish processed is the measure of the tax all fish bought or obtained by fish processors doing business in Alaska contribute to some extent to Alaska tax revenues. Canneries are taxed most heavily in Alaska. They are taxed on their business operations in Alaska under a tax at 6 per cent of the value of the salmon bought or otherwise obtained for canning. Freezer ships are taxed less than either canneries or cannery ships since they are taxed at a rate of 4 per cent of the value of raw fish bought or taken for freezing. This is understandable since, although canneries and freezer ships are interested in obtaining the same species of fish for the same ultimate purpose, the total volume of business activities of freezer ships is less than the total volume of business of Alaska canneries. Salmon, halibut, shellfish, and other fish bought for processing through freezing, salting, or other methods, are taxed at 1 per cent. This is understandable because cold

the United States District Court to decide the amount of taxes actually due the State upon remand.

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storages are not interested in buying fish "in the round," but rather buy higher quality fish at higher prices which have been treated much more carefully than cannery-destined fish, and which in the great majority of the cases have been cleaned (R. 243-244). Cold storages are interested particularly in king salmon and silver salmon, while canneries are interested largely in red, pink and chum salmon, and to some extent silver salmon (R. 234-235 and 263). Freezer ships are particularly interested in red salmon since the bulk of the fish they catch are caught in Bristol Bay where red salmon predominate. The fact is that there are three different industries here. Canneries and freezer ships are perhaps the most similar in nature in that they are interested in the same type of fish.

Moreover, shore-based cold storages freeze fish for the fresh frozen consumer market; they are not in competition with freezer ships who can all their fish (R. 240-251). Fish frozen by a cannery but not canned are likewise not in competition with the freezer ships' product. Fish obtained by Alaska canneries for canning are in competition with fish obtained by freezer ships, but the freezer ship companies have no reason to complain since the tax on the fish obtained by freezer ships is less than the tax on fish obtained by canneries.

The respondents make much of the fact that a taxpayer who obtains and freezes salmon for later canning in Alaska will pay no tax with respect to the activity of freezing the salmon in Alaska, while a taxpayer who obtains and freezes salmon for later canning in an other state must pay a tax of 4 per cent of its value with respect to the same activity. The Ninth Circuit in its opinion of March 16, 1959, answered this contention:

> "We see no significance in the fact that the Alaskan canneries do not pay a tax at the freezing stage on fish which they later can. This is only an illusionary benefit for such fish will be taxed at the 6 per cent rate before they enter the market to compete with appellants' product. The same is true of the fact that the Territory does not collect the 1 per cent freezing tax from shore-based cold storages on fish which are later canned in Alaska, for these fish are likewise subject to the 6 per cent canning tax before they enter the canned salmon market." (Pet. Br. App. 6a)

It would have been more logical for the Legislature to have required cold storages to pay taxes for salmon which are frozen for later canning in Alaska. In fact, it may well be that the statute does require this and that the administrative practice of not requiring this tax is totally erroneous and without any foundation in law. A business license tax or a gross receipts tax is generally measured by some index of the business activity of the business to be taxed, and in the case of a cold storage any freezing of fish for later canning would logically be part of the measure by which the total tax liability should be calculated.[2]

Accordingly, it would appear that the Department of Taxation may have erred in not considering the

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[2] For example, the volume of business activity might be measured by net income, as is the case with the Alaska business license tax applicable to banks, both state and federal. The business license tax on banks is measured by the net income of the banks and is 2 per cent of the net income. See Sec. 5(b), Ch. 43, SLA 1949. The volume of business activities of the great majority of Alaska businesses is measured by their gross receipts. Sec. 5(a) of Ch. 43, as amended by Ch. 128, SLA 1955 provides for a license fee of $25 plus a sum equal to one half of one per cent of the gross receipts in excess of $20,000 with a tax of one quarter of one per cent on all gross volume in excess of $100,000.

salmon frozen by cold storages for later canning in calculating their taxes. This is understandable since freezing of salmon for later canning is an isolated and unusual activity for a cold storage (R. 343). It is not an activity which the Legislature would necessarily be expected to take into consideration in framing a reasonable business license tax program applicable to all fish processors doing business in Alaska, nor is it a business activity which the Department of Taxation would be expected to take any particular note of. No one thinks of cold storages as being in the business of freezing salmon for later canning. This type of activity only takes place in emergency conditions such as when fish suitable for canning purposes are caught early in the season before the canneries have opened (R. 344). In some cases cold storages will hold these salmon and keep them frozen until the canneries open.

The cold storages in Alaska seldom freeze fish "in the round" for canneries. Wallis George, president and manager of the Juneau Cold Storage Company, stated in his deposition (R. 344) that during his 27 years with the company it had only happened two or three times. It occurs "only when the run is so heavy that they can't take care of them in their own canning plants" (R. 344).

At page 234 of the Transcript of Record, James G. Pinkerton, manager of the Ketchikan Cold Storage, was questioned regarding the amount of fish frozen for later canning by a land-based cold storage. He stated that as a matter of courtesy to their fishermen the cold storages would take fish undesirable for the fresh frozen market and can them (R. 234-235). At page 239, however, Mr. Pinkerton admitted that it was not ordinarily done in the course of business and that

it was an "isolated, incidental thing." Laws of the Territory and State prohibit the wasting of a natural resource. See 39-2-19, ACLA 1949; Sec. 27, Art. I, Ch. 94, SLA 1959. Natural business economics demand that these fish be used, though undesirable for fresh frozen purposes. However, this type of operation is outside the usual scope of business of land-based cold storages.

Furthermore, although cold storage operators take all fish, whether the type desired for their particular operation or not, they would prefer to avoid freezing fish that will be canned later. It is a process that is "expensive" and the duplication is avoided if possible.[3]

Several distinctions between the business of freezer ships and the land-based cold storages are apparent. Freezer ships freeze their fish by the "brine method,"[4] explained very well in Respondents' Brief at 8-9, whereas cold storages use the "sharp freeze method" indicated in the testimony of Homer Kyros (R. 270). If this were the only difference, the tax classification would probably not be justified.

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[3] Deposition of Thomas Sidney Parke: Q. Do you know whether such operations [Our note: Cold storage for later canning] have been conducted at, for instance, the Pelican Cold Storage and Pelican Packing Company? A. Yes, I do know that the Pelican Cold Storage preserved fish—I am not so sure of the year, but I believe it was '49, the year they had a big run and they weren't prepared for it. The canneries weren't geared for it, but I don't know of the Pelican Cold Storage holding fish for the Pelican Canning Company. I know that is a very expensive operation to actually do both types, so it isn't readily done. Q. How do you know it is expensive? A. Just from facts I have been told throughout the operation. They avoid it if they possibly can. (R. 252)

[4] The Pacific Queen in the 1951 season only used the "air blast" method. Resp. Br. 9.

However, it is not the only distinction. The land-based cold storage is as it states—land-based, whereas the other is a transient operation. See R. 258, 281, 289-90. This situation has been recognized by this Court as an "evident difference in the mode of doing business." *Singer Sewing Machine* v. *Brickell*, 233 U.S. 304 (1914).

Then again the land-based cold storages are in no way competitive with freezer ships. The freezer ships and the floating cold storages freeze fish for later canning only, while most of the fish taken by the land-based cold storages are frozen for the fresh fish market (R. 74). The differences in the disposition of the fish require substantially different treatment of the fish. Fish frozen for canning are frozen "in the round" while fish frozen for the fresh fish market are cleaned shortly after their taking. Freezing "in the round," with the entrails still in the fish, tends to lower the final quality and flavor of the fish while the immediate cleaning and freezing of fish after they are caught results in a higher quality fish (R. 240, 301-302). Freezer ships also take seine-caught salmon while the land-based cold storages obtain the more valuable and higher priced trolling-caught kings and cohoes (R. 74).

The freezer ship does not suffer from discrimination when compared to a cannery, since the tax on freezer ships after all the freezer ship operations are lumped together will not exceed 6 per cent whether or not the freezer ships freeze any of their fish or whether or not any of the freezing of the freezer ships occurs within Alaska's taxing jurisdiction. If the freezer ships do any part of their business in Alaska their tax will be 6 per cent even though there is no freezing of fish which Alaska taxes could reach. By the same token,

canneries in Alaska are subject to the 6 per cent tax no matter how many or how few business activities they engage in in the process of canning fish. The tax would be the same whether or not they caught, loaded, unloaded, de-headed or froze their fish. Certainly, it would be unreasonable to tax an Alaska cannery an additional 4 per cent tax, a 1 per cent tax, or any tax, if it should freeze its salmon before canning it, since the tax is not on the canning, or the freezing, or the unloading of the fish on a cannery dock, or the de-heading, or any other single phase of the cannery activity, but as in the case of a freezer ship operation, is on the entire business activity occurring in Alaska.

III

No Due Process Rights of Respondents Are Being Violated Since Alaska Is Taxing No Activity Outside of Its Jurisdiction. Respondents Are Not Wronged By Being Assessed a Lower Tax Than Their Competitors

We believe that this Court should decide the due process clause question and classification defense raised by the respondents, since this Court would necessarily consider both questions when passing on the issue of discrimination. The due process defense is clearly inapplicable since Alaska does not seek to tax any of the activities of the respondents carried on outside of the taxing jurisdiction of the State of Alaska. The classification defense is inapplicable if the discrimination argument is found wanting since the respondents cannot show themselves wronged by the 4 per cent tax on their activities as opposed to the higher tax imposed on cannery activities. The fact that shore-based cold storages are taxed at 1 per cent is of no relevance since

they are engaged in totally different type of business and are not in competition with either canneries or freezer ships.

However, there is one remaining ground which the Ninth Circuit Court of Appeals should pass on in the event that this Court should decide for the State of Alaska on both of the interstate commerce questions. Some court must determine the extent of Alaska's taxing jurisdiction in order to enable an Alaska court to determine the exact amount of the tax liabilities of the freezer ships. Under any ruling of this Court or of the Ninth Circuit Court of Appeals regarding the extent of Alaska's taxing jurisdiction, it appears that there will probably be some freezer ship operations of the freezer ship companies which will be totally outside of Alaska's taxing jurisdiction and which will be totally exempt from any Alaska taxes whatsoever. This means that certain issues of fact will eventually have to be determined by a trial court as outlined in the conclusion of the opinion of the Court of Appeals dated March 16, 1959, since withdrawn. (See Pet. Br., App. 18a).

CONCLUSION

Petitioners urge the Court to uphold Alaska freezer ship tax on the ground that it is a tax on a local activity and is not designed to discriminate against interstate commerce. *Oliver Iron Co.* v. *Lord,* 262 U.S. 172 (1923). This Court should also remand the case to the Ninth Circuit Court of Appeals to determine the extent of Alaska's taxing jurisdiction and thereby allow

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Dated this 9th day of
February, 1961, at
Juneau, Alaska.

SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1960.

State of Alaska, Petitioner, v. Arctic Maid, et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 1, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

While Alaska was a Territory, the Territorial Legislature amended, L. 1951, c. 116, its taxing statutes to read, in relevant part, as follows:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

. . . . . .

"(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the

raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

Respondents[1] use freezer ships for the taking and preservation of salmon along Alaska's shores. These freezer ships use "catcher boats" which respondents own or have under contract and which catch salmon off Alaska. The freezer ships sometimes purchase salmon from independent fishermen.

Bristol Bay is a famous fishing ground for salmon. When operating in the Bristol Bay area, the freezer ships anchor more than three miles from the coast, because of the shallow waters in Bristol Bay. They serve as a base for their catcher boats that fish within the territorial waters. In other areas both the freezer ships and the catcher boats stay within the territorial waters.

When the catcher boats—which are shallow-draft and known as gillnetters—have a load or desire to discontinue fishing or when the open season ends, they return to the "mother" ship and unload. The salmon are usually dumped into quick-freezing brine tanks. At other times they are placed in freezing compartments and frozen by blasts of air. The freezer ships eventually return to Puget Sound in the State of Washington where the salmon are canned.

Alaska, when a Territory, brought these suits in the District Court of Alaska for taxes claimed to be due and owing under the foregoing Act. The District Court entered judgments for the plaintiff. 140 F. Supp. 190.

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[1] One of the respondents is a Washington corporation. Four remaining respondents are partnerships all of whose members are citizens of the United States and residents of either California or Washington. The Pacific Reefer Co. is the owner of the ship Reefer II, as to which a tax lien is asserted to exist by virtue of the activities of a previous owner. It too is a foreign corporation.

It held that the taking of the fish was the taxable event, not the freezing of the fish.

On appeal the Court of Appeals held that respondents were taxable for fish caught by their catcher boats within territorial waters, even though the freezer ships remained outside the three-mile limit. In its view the catcher boats "operated by the freezer ship itself are but an extension of that ship's operations." It held, however, that respondents were not responsible for taxes on fish taken "by independent catcher boats but purchased by the freezer ships" outside territorial waters. There was a rehearing *en banc* and on the rehearing the Court of Appeals held that the tax incident was not taking fish but "the freezing and cold storage of fish aboard freezer ships." It held that the tax could not be levied even if the freezer ships received the salmon in territorial waters. It reasoned that the freezing and storage of the fish was an inseparable part of interstate commerce and could not be taxed locally anymore than the loading and unloading of interstate carriers. Cf. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69. Accordingly it reversed the District Court. 277 F. 2d 120. The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska. 364 U. S. 811.

We put to one side the specialized cases such as *Richfield Oil Corp.* v. *State Board*, *supra*, which arise under the Export-Import Clause of the Constitution (Art. I, § 10, cl. 2) because none of the salmon involved in these cases was destined to a foreign country. We also consider irrelevant cases such as *Joseph* v. *Carter & Weekes Co.*, *supra*, where a state tax was laid on the gross receipts of a stevedore who was loading and unloading vessels engaged in interstate commerce. A tax on an integral part of an interstate movement might be imposed by other States "with the net effect of prejudicing or unduly bur-

dening commerce" as the Court said in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 166.

We have no such problem here. This tax is one imposed on those "prosecuting or attempting to prosecute . . . lines of business in connection with Alaska's commercial fisheries." The business in question is the one specified in subsection (b): "Freezer ships and other floating cold storages." To be sure the tax is computed on the "value" of the fish "bought or otherwise obtained for processing through freezing." That however is the measure of the tax, not the taxable event. The taxable event is "prosecuting" the "business" of "Freezer ships or other floating cold storages." Part of the business is, of course, transporting frozen fish interstate. Yet it is plain that a freezer ship is more—much more—than an interstate carrier. Part of its business is freezing fish. Yet these ships do more than freeze fish and transport them interstate. Taking the fish directly through their own catcher boats or obtaining them from other fishermen is also a part of respondents' business. Without the taking or obtaining of the fish, the freezer ship would have no function to perform.

It is clear that Alaska has power to regulate and control activity within her territorial waters, at least in the absence of conflicting federal legislation. *Skiriotes* v. *Florida*, 313 U. S. 69, 75. That case involved a state law forbidding the use of certain equipment in taking sponges in waters two marine leagues from mean low tide off Florida's coast. We upheld Florida's power to regulate sponge fishing in that manner and in that area, as Congress had not adopted any inconsistent regulation. See also *Toomer* v. *Witsell*, 334 U. S. 385, 393. Alaska's jurisdiction to tax respondents' operations within her territorial waters—whether those activities are taking fish or purchasing fish taken by others—is equally clear. See *Wisconsin* v. *Penney Co.*, 311 U. S. 435, 444; *Ott* v. *Mississippi Barge Line*, 336 U. S. 169, 174.

If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach. But since some of the fish in all of the cases before us were taken in Alaska's waters or otherwise acquired there, respondents are engaged in business in Alaska when they operate their "freezer ships." For we know from this record that in this particular business taking and freezing are practically inseparable. Fish are highly perishable and cannot be kept fresh very long even in Alaska's latitude. The process of gathering fish either through the catcher boats that are part of respondents' fleet or through independent operators is a "local activity" (*Michigan-Wisconsin Pipe Line Co. v. Calvert, supra,* 166) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer* v. *Witsell, supra*) and the extraction of ore (*Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here, as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach. Catching the fish or obtaining them in other ways from the local market is but an extension of the freezer ship's operations within Alaska's waters.

It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six percent tax on the value of salmon obtained for canning; [2] and local

[2] L. 1949, c. 82, § 1 (a), as amended, L. 1951, c. 113, § 1.

fish processors, which sell to the fresh frozen consumer market, paid a one percent tax.[3] The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaska canners; and we know from the record that fish canned locally usually are not frozen.[4] When we look at the tax laid on local canners and those laid on "freezer ships," there is no discrimination in favor of the former and against the latter. For no matter how the tax on "freezer ships" is computed, it did not exceed the six percent tax on the local canners. Hence cases such as *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 595–596, which hold invalid state laws that prefer local sales over interstate sales are inapposite. If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so "palpably disproportionate" (*Harvester Co.* v. *Evatt*, 329 U. S. 416, 422) as to run afoul of the Commerce Clause. No "iron rule of equality" between taxes laid by a State on different types of business is necessary. *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117, 119–121; *Morf* v. *Bingham*, 298 U. S. 407, 414; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546–547.

The judgment is reversed. Since we do not know how many fish, if any, were obtained outside Alaska's territorial waters,[5] we remand the cause to the Court of Appeals for proceedings in conformity with this opinion.

Reversed.

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[3] L. 1949, c. 97, § 1 (a), as amended, L. 1951, c. 116, § 1 (a).

[4] Fish are sometimes frozen for local canneries when the run is more than the canneries can take care of; but that freezing is merely an adjunct of the local canning industry.

[5] Alaska contends that its territorial waters in the Bristol Bay area reach beyond the usual three-mile limit. That is a claim on the merits of which we express no opinion.

SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1960.

State of Alaska, Petitioner, v. Arctic Maid, et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 1, 1961.]

Mr. Justice Harlan, dissenting.

It is with reluctance that I have reached the conclusion that this Alaska tax offends the Commerce Clause of the Federal Constitution. (Art. I, § 8, cl. 3.)

The Court of Appeals concluded that the taxable event under this statute is the process of freezing fish aboard ship. 277 F. 2d 120. This conclusion was based on the words of the statute (quoted at p. — of the Court's opinion), the fact that obtaining fish for local sale or consumption is untaxed, and the fact that the present tax "applies whether or not the fish are caught by gill-netters owned by or under contract to appellants." *Id.*, 125–126. Accepting, as I do, this construction of the statute, I agree with the Court of Appeals that a *privilege* tax directed solely at shipboard-freezing, preparatory to interstate shipment, exceeds the limitations the Commerce Clause imposes upon the States, for in its requirement of a license such a tax asserts a power to deny what is a necessary local incident of the right to make interstate purchases. See *York Manufacturing Co.* v. *Colley*, 247 U. S. 21.*

*I also regard the tax as invalid because it in effect charges a toll for the interstate transportation of Alaska's natural resources. See Brown, Justice Frankfurter—The Open Economy, 67 Yale L. J. 219, 232–233.

As I understand the Court's opinion, it seeks to meet this objection by denying that the Alaskan tax is imposed on the privilege of freezing fish aboard ships. It says that the tax is rather upon the local taking or purchase of fish *by or for freezer boats*. But even on this view of the incidence of the tax, I could not agree that the present tax on obtaining fish by or for interstate freezer boats would be constitutional in the given circumstances, for I do not think that Alaska can place a higher tax on the obtaining and freezing of fish for interstate markets than it places on the obtaining and freezing of fish for local markets. See *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596, 597. As shown in the Court's opinion, under the Alaska scheme of taxation freezer boats which operate solely in interstate commerce, must pay a tax for taking and freezing Alaskan fish for later canning in Washington which is four times that imposed on a local freezer whose product is sold to consumers in Alaska. A shore-based freezer who sells his frozen product to Alaskan canners pays no tax at all.

For these reasons I would affirm the judgment of the Court of Appeals.